

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221620

DATE: May 15, 1986

MATTER OF: Alfa-Laval, Inc.

DIGEST:

Where "Brand Name or Equal" clause is not included in request for proposals there is no basis for the protester's contention that award was improper because the awardee does not propose to offer an "equal product." Under the solicitation, offerors were not required to provide information demonstrating the "equality" of products offered and in its proposal the awardee did not take any exception to the solicitation's requirements.

Alfa-Laval, Inc., has protested an award to Diesel Power International Inc. (Diesel Power) under request for proposals (RFP) NOO033-85-R-0158 issued on August 8, 1985, by the Military Sealift Command (Command), Department of the Navy, for the procurement of a diesel oil purifier for the USNS Redstone, a missile range instrumentation ship. Alfa-Laval asserts that the oil purifier offered by Diesel Power is not the equivalent of the protester's brand name diesel fuel oil purifier identified in the solicitation. Contract performance has been suspended pending our decision.

We dismiss the protest in part and deny it in part.

The principal item to be supplied is described in the RFP's specifications as an "automatic, self-cleaning diesel fuel oil purifier unit, Alfa Laval Model WHPX-405 or equal." This is the sole reference to "brand-name-or-equal" in the solicitation. The solicitation provides in section "M," Evaluation Factors for Award, that offers should be submitted at the most favorable price since offers will be evaluated on the basis of the lowest price to the government. No evaluation factors other than price are set forth, and there is no provision in the solicitation for a technical evaluation or review of the purifier units offered. On January 9, 1986, the Command awarded the contract for the oil purifier to Diesel Power, which submitted the low best and final offer of \$38,900. The price offered

by Alfa-Laval was \$72,190. It appears that in its proposal, Diesel Power neither identified the purifier it was offering nor provided any technical information on that product.

In part, Alfa-Laval has challenged the determination by the agency that the oil purifier offered by Diesel Power is an acceptable product which will meet the technical requirements set forth in the solicitation. The protester contends that the oil purifier proposed by Diesel Power is not "equal" to the Alfa-Laval brand model identified in the solicitation.

Although the solicitation requests that offerors provide an "Alfa-Laval Model WHPX-405 or equal" the RFP does not require an offeror to indicate which brand and model purifier it proposes to offer. Furthermore, the solicitation neither contains nor incorporates by reference the "Brand Name or Equal" clause set forth at section 52.210-7000 of the Department of Defense Supplement to the Federal Acquisition Regulation, 48 C.F.R. § 252.210-7000 (1984). In pertinent part, the brand name or equal clause provides that an offeror shall identify any "equal" product which it proposes to furnish under the solicitation and that the offeror should furnish descriptive material necessary for the purchasing activity to determine whether the product offered meets the salient characteristics required by the solicitation.

The agency advises that since it had "inadvertently" failed to include in the RFP the "Brand Name or Equal" clause, it did not request from offerors detailed technical information on the purifiers offered. Although it is not entirely clear from the record before us, it appears that during discussions held subsequent to the submission of its initial proposal Diesel Power informed the agency that it was proposing to offer the Mitsubishi Kakoki Kaisha (MKK) SJ-10P model purifier.

Although the Command's original intent may have been for this to be a "brand-name-or-equal" purchase, it did not, in fact, issue a solicitation nor conduct the procurement on that basis. The solicitation contains about four pages of detailed specifications concerning the performance and design characteristics of the diesel fuel oil purifier. Since the solicitation did not contain the "Brand Name or Equal" clause, Diesel Power was not obligated to provide the agency with descriptive material which would enable the

agency to determine whether the purifier unit it offered was "equal" to the Alfa-Laval purifier identified in the solicitation. Offerors only were required to submit a price for furnishing the supplies described in the specifications. There is nothing in either Diesel Power's initial proposal or best and final offer which would indicate that it takes exception to or could not meet any of the detailed technical specifications set forth in the solicitation.

In the absence of the "Brand Name or Equal" clause, we have no basis upon which to conclude that the purifier offered by Diesel Power will not fully meet the technical requirements set forth in the solicitation. See Connecticut Telephone & Electric Corp., B-217101, Feb. 25, 1985, 85-1 C.P.D. ¶ 233 and Mosler Systems Division, American Standard Co., B-204316, Mar. 23, 1982, 82-1 C.P.D. ¶ 273. Because its offer did not take any exception to the solicitation's specifications Diesel Power, in effect, remains obligated to furnish the agency with a purifier unit which conforms to those specifications. See Mosler Systems Division, American Standard Co., supra, 82-1 C.P.D. ¶ 273 at 3.


Whether Diesel Power is able to provide a purifier which meets the solicitation's requirements is a matter of that offeror's responsibility. We will not question a contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith or misapplication of definitive responsibility criteria. The Ted Trump Co., B-217304, Sept. 9, 1985, 85-2 C.P.D. ¶ 278. Neither exception is alleged to be present here. We note that the agency has advised that it has ascertained from the preaward survey that Diesel Power is capable of performing and understands the specifications. Whether Diesel Power will in fact deliver a purifier unit which meets the solicitation's specifications is a matter of contract administration which is the responsibility of the contracting agency and is not for consideration under our bid protest function. Motorola, Inc., B-218888.3, Aug. 22, 1985, 85-2 C.P.D. ¶ 211.

The protester also asserts that Diesel Power's offer should have been rejected because the MKK purifier is an untried and unproven unit and that it has been found to be "technically not qualified" in about every instance in prior government and commercial procurements. These contentions

are without merit. There are no requirements set forth in the solicitation's specifications concerning the length of time during which the purifier unit must have been commercially available. Furthermore, the mere fact that the MKK purifier may have been found technically unacceptable in prior procurements, a fact not established in the record before us, is not in any way determinative of its acceptability under the present procurement. The propriety of each award under a negotiated procurement depends not on prior procurements but on the facts and circumstances of each particular procurement. See Ensign-Bickford Co., B-211790, Apr. 18, 1984, 84-1 C.P.D. ¶ 439 at 9.

Lastly, Alfa-Laval in effect asserts that its service and spare parts facility is superior to that of Diesel Power's and that the awardee's supplier lacks experience in federal government procurements. It is immaterial whether Diesel Power's service and spare parts facility is equal to that of Alfa-Laval since Diesel Power is obligated to meet the requirements of the solicitation's specifications. In any event, Alfa-Laval has not alleged that Diesel Power will be unable to meet the solicitation's requirements for spare parts. To the extent that the protester's comments call into question the awardee's responsibility, as stated above, our Office does not consider affirmative determinations of responsibility except for circumstances not applicable here.

Accordingly, the protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel